IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARK GRANSBERRY,

Petitioner, ORDER

v. 02-C-598-C

WISCONSIN DEPARTMENT OF CORRECTIONS UNIT MANAGER ELISABETH TEGELS and WARDEN THOMAS E. KARLEN,[1]

Respondents.

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This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner, an inmate at Jackson Correctional Institution in Black River Falls, Wisconsin, alleges that respondents Elisabeth Tegels and Thomas Karlen violated his constitutional rights when they failed to stop his cellmate from racially harassing him and

[1] I construe petitioner's caption as naming two respondents: "Wisconsin Department of Corrections Unit Manager Elisabeth Tegels" and "Warden Thomas E. Karlen." If petitioner intended to name the Wisconsin Department of Corrections separately, it would have to be dismissed because petitioner does not allege that either Tegels or Karlen acted in accordance with a policy of the department. Bailey v. Faulkner, 765 F.2d 102, 104 (7th Cir. 1985) ("The agency must be culpable in its own right, for example by having a policy of violating such rights.")

then issued a conduct report to petitioner, placed him in a lockup cell, searched his cell and confiscated his legal papers after he complained about the harassment. Petitioner has submitted the initial partial payment required under 28 U.S.C. § 1915(1)(b).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if, on three or more previous occasions, the prisoner has had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case on its own for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

I conclude that petitioner has stated a claim upon which relief may granted on his claims that respondent Tegels retaliated against him for exercising his First Amendment rights and discriminated against him on the basis of race in violation of the Fourteenth

Amendment for disciplining him but not his cellmate for similar conduct. Accordingly, petitioner's request for leave to proceed in forma pauperis will be granted with respect to those two claims. However, I will deny petitioner's request for leave to proceed on his claim that respondents violated his constitutional rights by failing to stop petitioner's cellmate from harassing him and on his state law claim that respondents caused him emotional distress because he has failed to state a claim upon which relief may be granted. Further, because petitioner has alleged no facts that would permit me to infer reasonably that respondent Karlen was personally involved in the alleged deprivation of petitioner's constitutional rights, respondent Karlen will be dismissed from this case.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Mark Gransberry is an inmate at the Jackson Correctional Institution in Black River Falls, Wisconsin. Respondent Elisabeth Tegels is a unit manager. Respondent Thomas Karlen is the warden.

Petitioner has a cellmate that refers to petitioner as "nigger" every day. In July 2002, petitioner submitted a written request to respondent Tegels, asking her to move him or his cellmate. He wrote, "I'm tired of this racist calling me 'Nigger!'" In addition, he referred to his cellmate as a "urine smelling, dirty ass cracker." Instead of complying with petitioner's

request, respondent Tegels issued a conduct report to petitioner. Respondent Tegels wrote that petitioner's "comments show overt disrespect for" his cellmate. Petitioner then filed an inmate complaint, contesting the conduct report. The inmate complaint examiner rejected it because he concluded that petitioner's complaint was outside the scope of the inmate complaint review system. The corrections complaint examiner and the office of the secretary of the Wisconsin Department of Corrections affirmed the decision to dismiss the complaint. Respondent Karlen never answered petitioner's complaint.

Petitioner was placed in temporary lockup from July 31, 2002, until August 9, 2002. Respondent Tegels told petitioner that the reason was that petitioner was "under investigation." While petitioner was away from his cell, several inmates saw respondent Tegels searching through petitioner's belongings. Petitioner discovered later that all his legal papers were missing.

DISCUSSION

I understand petitioner to allege that respondents violated his constitutional rights when they failed to stop petitioner's cellmate from racially harassing him. Racism in any form is reprehensible and it should not be condoned in any part of society. Although prisoners are expected to endure many "harsh" and "restrictive" conditions as "part of the penalty . . . for their offenses," Rhodes v. Chapman, 452 U.S. 337, 347 (1981), bigotry and

intolerance should not be among them. See Santiago v. Miles, 774 F. Supp. 775, 777 (W.D.N.Y. 1991) ("Racism is never justified; it is no less inexcusable and indefensible merely because it occurs inside the prison gates.")

Nevertheless, not all racial insensitivity violates the Constitution. Even when a prison official uses racially derogatory language, the Court of Appeals for the Seventh Circuit has held that "verbal harassment does not constitute cruel and unusual punishment, deprive a person of a protected liberty interest or deny a prisoner equal protection of the laws." DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2002). Furthermore, under 42 U.S.C. § 1983, prison officials generally cannot be held liable for the actions of third parties. See Martinez v. California, 444 U.S. 277 (1980). To hold respondents liable under the Eighth Amendment for failing to stop the cellmate's harassment, petitioner would have to show that there is a substantial risk that his cellmate will harm him and that respondents are aware of this risk. Washington v. LaPorte County Sheriff's Department, 306 F.3d 515, 517-18 (7th Cir. 2002); Case v. Ahitow, 301 F.3d 605, 605 (7th Cir. 2002). Although I have no doubt that sharing close quarters with a racist is extremely unpleasant, petitioner has alleged no facts that would permit me to infer that he is in danger. Petitioner has not alleged that his cellmate has used violence against him or threatened him in any way. In such a case, prison authorities are authorized to separate inmates to avoid racial tensions, but they are not required to do so. Lee v. Washington, 390 U.S. 333, 334 (Black, J., concurring) (stating

that "prison authorities have the right, acting in good faith and in particularlized circumstances, to take into account racial tensions" when deciding cell assignments). Accordingly, petitioner's claim that respondents violated his constitutional rights by failing to stop petitioner's cellmate from harassing him will be dismissed for failure to state a claim upon which relief may be granted.

Petitioner's complaint also contains allegations that respondent Tegels violated his constitutional rights by issuing petitioner a conduct report, placing him in lockup, searching his cell and confiscating his legal documents when he complained about his cellmate's racial harassment and asked to be moved. Liberally construed, petitioner appears to allege that he is an African-American and his cellmate is white. Therefore, I understand petitioner to be alleging that respondent Tegels discriminated against him on the basis of race in violation of the Fourteenth Amendment by disciplining him for referring to his cellmate as a "cracker" but not disciplining his cellmate for calling petitioner "nigger" repeatedly.

The equal protection clause of the Fourteenth Amendment provides that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). It may be that respondent Tegels had legitimate reasons for issuing a conduct report to petitioner only, or that petitioner and his cellmate are not similarly situated because, for example, respondent Tegels did not have direct evidence of the cellmate's derogatory language. However, at this stage of the proceedings, I cannot conclude

that petitioner will be unable to prove his claim. Because petitioner "suggests discriminatory motives impelled discriminatory treatment of him, he has stated an equal protection claim." Antonelli v. Sheehan, 81 F.3d 1422, 1433 (7th Cir. 1996). I will grant petitioner leave to proceed on a claim that respondent Tegels violated his right to equal protection under the Fourteenth Amendment. To prevail on his claim, petitioner will have to show that he is similarly situated to his cellmate, that is, that there are no relevant differences between petitioner's conduct and his cellmate's, and that the difference in treatment was because of his race.

Alternatively, petitioner may be alleging that respondent Tegels issued him a conduct report, put him in lockup and searched his cell in retaliation for petitioner's complaint about his cellmate's racial harassment and his request to be moved. Even though respondent Tegels was not constitutionally required to stop petitioner's cellmate from harassing him, she did not have impunity to retaliate against him for complaining about his conditions of confinement. See Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996) ("To succeed on his retaliation claim, [Babcock] need not establish an independent constitutional interest.") Petitioner has a right under the First Amendment to seek redress of his grievances with the government, which includes prison officials. Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir 1995) (cited in Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002)) ("The 'government' to which the First Amendment guarantees a right of redress of grievances

includes the prison authorities.") Although petitioner's grievance was not in the form of an inmate complaint, it is the content of the grievance and not its form that is protected by the First Amendment. See Walker, 288 F.3d at 1009 (reversing district court for dismissing retaliation claim because petitioner failed to use proper forms). If petitioner can show that respondent Tegels issued the conduct report and took other punitive action not because petitioner used disrespectful language but because he complained about his prison conditions, Tegels may be liable to petitioner. Babcock, 102 F.3d at 275 ("[T]he ultimate question is whether events would have transpired differently absent the retaliatory motive."). Therefore, I will grant petitioner leave to proceed on a claim that respondent Tegels retaliated against petitioner for exercising his First Amendment rights.

However, petitioner has made no allegations that respondent Karlen was personally involved in respondent Tegels's alleged behavior. The general rule is that, under 42 U.S.C. § 1983, supervisors cannot be held liable for the actions of their employees. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Rather, to be held liable, "supervisory officials . . . must have had some personal involvement in the constitutional deprivation, essentially directing or consenting to the challenged conduct." Doyle v. Camelot Care Centers, Inc., 305 F.3d 603, 614-15 (7th Cir. 2002). Petitioner alleges only that respondent Karlen did not respond to petitioner's inmate complaint. But the documents attached to petitioner's complaint show that the reason the complaint was rejected was that it was outside the scope

of the inmate complaint review system. Beanstalk Group, Inc. v. AM General Corp., 283 F.3d 856, 858 (7th Cir. 2002) (documents attached to the complaint become part of it for all purposes). The merits of petitioner's complaint were not addressed. Therefore, there is no basis in petitioner's complaint from which I can reasonably infer that respondent Karlen directed or consented to the violation of petitioner's constitutional rights. Respondent Karlen will be dismissed from this action.

Finally, I note that petitioner requests damages for "emotional distress." To the extent petitioner seeks to recover for an emotional injury under federal law, such damages are barred by 28 U.S.C. § 1997e(e). Under that statute, no federal civil action may be brought by a prisoner for emotional harm "without a prior showing of physical injury." Plaintiff has not alleged that he was harmed physically so he cannot recover for emotional distress under 42 U.S.C. § 1983. To the extent that petitioner means to assert a state law claim for infliction of emotional distress, I conclude that he has failed to state a claim upon which relief may be granted. Under Wisconsin law, to recover for intentional infliction of emotional distress, a plaintiff must show that (1) the conduct was intended to cause emotional distress; (2) the conduct was extreme and outrageous; (3) the conduct was the cause of the person's emotional distress; and (4) the emotional distress was extreme and disabling. WIS. JI-CIVIL 2725. Petitioner has alleged no facts suggesting that his emotional injury was "extreme and disabling." Further, a plaintiff cannot recover for negligent

infliction of emotional distress in Wisconsin unless he or she was either physically injured or witnessed a serious injury of a close relative. Rabideau v. City of Racine, 2001 WI 57, ¶ 23, 243 Wis. 2d 486, 627 N.W.2d 795. Because petitioner has not alleged a physical injury, his state law claims will be dismissed.

ORDER

IT IS ORDERED that

1. Petitioner Mark Gransberry's request for leave to proceed in forma pauperis is GRANTED on his claim that respondent Elisabeth Tegels retaliated against him for exercising his First Amendment rights and on his claim that respondent Tegels discriminated against him on the basis of race in violation of the Fourteenth Amendment violated by disciplining petitioner but not his cellmate for similar behavior.

2. Petitioner's request for leave to proceed is DENIED with respect to his claims that respondents violated his constitutional rights by failing to stop his cellmate from racially harassing him and his state law claim that respondents caused him emotional distress.

3. Respondent Thomas Karlen is DISMISSED from this action.

4. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyers who will be representing respondents, he should serve the lawyers

directly rather than respondents. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' lawyers.

5. The unpaid balance of petitioner's filing fee is $123.37; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.

Entered this 17th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge